

VIRGINIA CITIZENS FOR BETTER RECLAMATION

VIRGINIA D. HILL

IBLA 83-702

Decided July 10, 1984

Appeal from the decision of the Director of the Virginia Field Office, Office of Surface Mining Reclamation and Enforcement, denying a citizen's complaint for enforcement action against Moose Coal Company. VA-BS6-5-83.

Reversed; issuance of cessation order directed.

1. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally -- Surface Mining Control and Reclamation Act of 1977: Permit Application:
Generally

OSM properly takes enforcement action against the owner of a surface coal mining operation who fails to submit a timely and complete application for a permanent program permit and who continues to operate under an interim permit after 8 months following approval of a state's permanent program.

APPEARANCES: Mark Squillace, Esq., Washington, D.C., for appellants; Courtney W. Shea, Esq., Office of the Field Solicitor, Department of the Interior, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

Virginia Citizens for Better Reclamation (VCBR) and Virginia D. Hill have appealed the decision of the Director of the Virginia Field Office, Office of Surface Mining Reclamation and Enforcement (OSM), dated May 17, 1983, denying their request for enforcement action against the Moose Coal Company (Moose Coal).

On March 16, 1983, VCBR filed a citizen's complaint on behalf of Virginia D. Hill pursuant to 30 CFR 842.12 1/ VCBR alleged that Moose Coal was conducting surface coal mining and reclamation operations in violation of section V771.13(b)(1) of the Commonwealth of Virginia's permanent program regulations because it had not filed a complete application for a permanent program permit by August 15, 1982, and thus was unlawfully mining under its interim permit more than 8 months after approval of Virginia's permanent program. 2/

1/ There is no copy of the citizen complaint in the record. The allegations it contains are mentioned in OSM's Complaint Investigation Report (VCBR's Statement, Exh. 2), issued in response to the complaint.

2/ Virginia's regulatory program was approved on December 15, 1981. The Virginia regulations pertinent to this appeal read as follows:

Section V771.11:

"Except as provided for in Section V771.13(b), on and after 8 months from the date on which a regulatory program is approved by the Secretary, no person shall engage in or carry out surface coal mining and reclamation operations on non-Federal or non-Indian land within Virginia unless that person has first obtained a valid permit issued by the Division under the approved regulatory program."

Section V771.13(b):

"(b) A person conducting surface coal mining operations, under a permit issued or amended by the Division in accordance with the requirements of Section 502 of the Federal Act, may conduct these operations beyond the period prescribed in Section V771.11 if --

"(1) Timely and complete application for a permit under the permanent regulatory program has been made to the Division in accordance with the

The circumstance of mining without a valid permit constitutes "a condition or practice which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air or water resources," 30 CFR 843.11(a)(2), unless such mining is "an integral, uninterrupted extension of previously permitted operations, and the person conducting such operations has filed a timely and complete application for a permit to conduct such operations." *Id.* at (i). ^{3/} Presented with the allegation of such a "condition or practice" in a citizen complaint, OSM is required to conduct an immediate inspection of the subject mining operation if the citizen complaint contains "adequate proof" that the State regulatory authority has failed to take "appropriate action," or, in the absence of such proof, if OSM has notified the State regulatory authority of the alleged "condition or practice"

fn. 2 (continued)

provisions of the Act, this Subchapter, and the regulatory program;

"(2) The Division has not yet rendered an initial decision with respect to such application; and

"(3) The operations are conducted in compliance with all terms and conditions of the interim permit, and the requirements of the Act, and initial program regulations."

Section V771.21:

"(a) Initial implementation of permanent regulatory programs.

"(1) Not later than 2 months following the initial approval by the Secretary of the regulatory program regardless of litigation contesting that approval, each person who conducts or expects to conduct surface coal mining and reclamation operations after the expiration of 8 months from that approval shall file an application for a permit for those operations. "(2) Applications for those operations which are not filed within the time required by Paragraph (a)(1) of this Section shall be deemed applications filed under Paragraph (b)(1) of this Section.

"(b) Filing deadlines after initial implementation of permanent regulatory program.

"(1) General. Each person who conducts or expects to conduct new surface coal mining and reclamation operations shall file a complete application for a permit for those operations sufficiently in advance of the expected commencement date of operations to allow for review of the application."

These State regulations repeat the language of the corresponding Federal regulations in 30 CFR Part 771.

^{3/} There is a second exception that does not pertain to the allegations in the citizen complaint in this case.

and, within 10 days after such notification, the State regulatory authority has failed to take appropriate action. 30 CFR 842.11(b)(1)(ii)(B) and (C).

Upon receipt of VCBR's complaint, OSM investigated the circumstances of Moose Coal's mining operations in cooperation with the State regulatory authority, the Virginia Department of Mined Land Reclamation (DMLR), and learned that the company had not submitted a timely and complete permit application under Virginia's permanent regulatory program. ^{4/} OSM'S complaint investigation report, dated March 29, 1983, reflects that OSM's action resulted in DMLR's further review and denial of Moose Coal's permit application, and an order that the company discontinue its coal excavation activity and begin to reclaim all disturbed areas. On April 8, 1983, however, a State hearing officer granted Moose Coal temporary relief from DMLR's enforcement action, finding that the company was entitled to a third review of its permit application and thereby allowing it to continue coal excavation activities pending DMLR's review of the application.

On April 11, 1983, VCBR requested informal review of OSM's initial action on its citizen complaint, pursuant to 30 CFR 842.15, characterizing OSM's investigation report of March 29 as a "decision not to take enforcement action in this matter." VCBR submitted that the appropriate enforcement action would be to order Moose Coal to cease mining until it received

^{4/} Pursuant to the regulations set forth in note 2, supra, Virginia's DMLR implemented a phased submission procedure for permit applications under which an applicant was allowed to make three successive application filings, due on Feb. 15, Apr. 15, and July 15 of 1982 (VCBR's Statement, Exh. 5). The phased submission procedure was "designed to allow the industry time to collect the required data while complying with application deadlines established by law." Id. The final deadline of July 15, 1982 (not Aug. 15, as mentioned in the investigation report), was calculated to provide adequate time (30 days) for DMLR's review of a "technically complete" application before the expiration of the 8-month deadline set in section V771.11. Id.

approval of a permanent program permit application. By decision dated May 17, 1983, OSM's Field Officer disagreed, deferring to the State hearing officer's ruling.

On June 15, 1983, Moose Coal withdrew its permit application because it had completed the coal excavation portion of its mining operations. In a letter dated June 16, 1983, DMLR notified VCBR that Moose Coal was being allowed to conclude its reclamation activities under the terms of its interim permit.

In its statement of reasons, VCBR argues that the conditions set forth in section V771.13(b) of the Virginia regulations were not met because Moose Coal did not submit a timely and materially complete application for a permanent program permit. As to the timeliness of Moose Coal's application, VCBR asserts that the company's initial submission was not made until July 15, 1982, when under the terms of V771.21 the application was due on February 15, 1982. VCBR acknowledges that an application submitted on July 15, 1982, is arguably timely under Virginia's phased submission policy, but argues that the policy is contrary to State and Federal law. As for the completeness of Moose Coal's application, VCBR notes that the State twice determined that the company's application was deficient in numerous respects, and argues that a "complete" application must "evidence a good faith effort to address and comply with all requirements of the approved program."

OSM's answer to VCBR's statement of reasons does not address the statement in any detail. The answer provides the information that Moose Coal submitted its initial phase 1 permit application to DMLR on February 15, 1982,

accordance with the State's phased submittal policy; that DMLR returned the application for corrections on March 16, 1982; that Moose Coal resubmitted phase 1 with phase 2 documents on May 12, 1982; and that Moose Coal filed phase 3 materials on July 15, 1982, without the blasting information subsequently submitted to DMLR on September 17, 1982. 5/ Following this recitation, OSM concludes:

3. OSM properly determined that under the circumstances of this case, and considering the criteria set forth in 30 U.S.C. § 1271(a), no further enforcement action by the Secretary of the Interior was necessary. The regulatory authority took appropriate action concerning the alleged violation and demonstrated a valid reason for its failure to take further action.

The "demonstration" to which OSM refers in its answer presumably is meant to be that described in the decision of the Field Office Director responding to VCBR's request for informal review. That decision turned on the determination of a State hearing officer that Moose Coal was entitled to a third review of its permit application. The Field Office Director stated:

In my judgment, OSM enforcement action against Moose Coal Company would be inappropriate. It would appear from the hearing officer's decision that the due process arguments offered by Moose Coal Company (specifically through Finding of Fact (t), i.e., "that by its past policies, procedures, and publications, the DMLR has led the public to expect three reviews of permanent program permit applications") are entitled to deference by OSM. The issue as to whether a permanent program permit application is entitled to three reviews as a matter of discretion or as a matter of right is a concern that should be addressed by the DMLR as soon as possible. In any event, OSM does not view it as appropriate to take enforcement action against the coal company

5/ OSM submitted no documentation supporting these assertions and the material is not otherwise in the record.

in this instance while no final administrative decision has been rendered by the regulatory authority.

(Letter to VCBR from Ralph H. Cox, dated May 17, 1983). To the Field Office Director's statement, VCBR has responded:

Whether or not Moose Coal was entitled to a third chance to submit a complete permit application, it plainly failed to submit such an application in a timely fashion, even allowing for the submission of such an application by July 15, 1982 under the state's phased submission policy. Having failed to submit a timely application, Moose was barred by law from continuing its mining activities after August 15, 1982.

(VCBR Statement of Reasons at 5). VCBR has further argued that the fact that Moose Coal has concluded its coal extraction activities does not end the matter because the company's continuing reclamation operations are "surface coal mining and reclamation operations" within the meaning of the Virginia program, and, thus, the company must obtain a permanent program permit for these operations.

The primary issue to be resolved in this appeal is whether OSM properly deferred to the State administrative actions in responding to VCBR's allegation that Moose Coal conducted surface coal mining and reclamation operations without a valid permit in violation of section V771.11 of the Virginia regulations. If OSM's response to the citizen complaint was not proper, the Board must also consider whether any Federal enforcement action is appropriate now.

[1] Under sections V771.11 and V771.13(b) of Virginia's regulations, a person's authority to continue surface coal mining and reclamation operations under an interim permit on and after August 15, 1982, was conditioned

on the filing of a timely and complete application for a permanent program permit. It is undisputed that Moose Coal's application submission on July 15, 1982, did not contain blasting information, and that the company did not submit blasting information until September 17, 1982 (OSM's Answer at Item 2). Moreover, on December 30, 1982, Moose Coal's application was returned by DMLR "due to numerous deficiencies as identified by the field inspector's review" (VCBR's Statement of Reasons, Exh. 1). Accordingly, we conclude that Moose Coal had not filed a materially complete application for a permanent program permit with DMLR on August 15, 1982, and, therefore, that its mining operations after that date were conducted without a valid permit. 6/

In determining that Moose Coal was entitled to a third review of its permit application, the State hearing officer appears to have ignored the plain requirements for timely and complete permit applications imposed under sections V771.11, V771.13(b), and V771.21 of Virginia's permanent program regulations. OSM's acquiescence in the hearing officer's determination was contrary to its oversight enforcement responsibilities under 30 CFR Parts 842 and 843, discussed, *supra*, because the State regulatory action was not "appropriate" under the circumstances.

That Moose Coal may now have completed the coal extraction and even the reclamation phases of its mining operations does not render OSM's error moot. OSM shall issue a cessation order to Moose Coal on the basis of the

6/ Cf. Citizens for the Preservation of Knox County, 81 IBLA 209 (1984). In that case the Board affirmed OSM in its determination that a mining company that conducted only reclamation operations on and after 8 months from the date of the Secretary's approval of the relevant permanent regulatory program was not required to obtain a permanent program permit for those operations.

company's having mined without a permit, in accordance with 30 CFR 842.11, and assess a civil penalty in accordance with the provisions of 30 CFR Part 845. Further, if OSM determines that Moose Coal is continuing in its surface coal mining and/or reclamation operations at the subject site, OSM shall order the company to reapply to DMLR for a permanent program permit covering such operations. In any event, OSM shall ensure that Moose Coal's reclamation operations have satisfied the performance standards of Virginia's permanent program regulations and that the operations are covered by a bond amount calculated in accordance with Virginia's applicable permanent program regulations.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Virginia Field Office Director is reversed, and OSM is directed to take enforcement action as directed in this opinion.

Wm. Philip Horton Chief
Administrative Judge

We concur:

Will A. Irwin
Administrative Judge

Gail M. Frazier
Administrative Judge

